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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1960

NO. 428

PITTSBURGH CONSOLIDATION COAL COMPANY, Petitioner

v.

JOHN A. WOUNICK, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Pittsburgh Consolidation Coal Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 17, 1960, (25) and in which a Petition for Rehearing was denied on July 20, 1960 (25).*

*References to this Petition or to the Appendices hereto are by page number alone. References to the appendices filed in the Court below are by page number following an "R", such as R1a. Page numbers using "a" are from Appendix of Appellant below (Respondent here) page numbers using "b" are from Appendix of Appellee below (Petitioner here).

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania has not been reported. A copy of it is appended hereto as Appendix A at pages 17 and 18.

The opinion of the United States Court of Appeals for the Third Circuit has not been reported as yet. A copy of it is appended hereto as Appendix C at pages 19 to 24.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 17, 1960 (Appendix D, 25). On July 20, 1960, the Petition for Rehearing filed by petitioner was denied (Appendix E, 25).

Jurisdiction to issue a writ of certiorari is conferred on this Court by the Act of June 25, 1940, c. 646, 62 Stat. 928, Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where no diversity jurisdiction existed and a seaman filed a civil action in the District Court under the Jones Act (The Act of June 5, 1920, 41 Stat. 1007, Title 46, U.S.C. §688) to recover for personal injuries and included a count for unseaworthiness and, where, upon trial before jury where the precise date of the alleged accident was always recognized to be a fact in issue, it was established that the action was not begun within three years after the date of injury, should judgment have been entered for the defendant?

2. Where no diversity jurisdiction existed and a seaman filed a civil action under the Jones Act contain-

ing a count for unseaworthiness, may the Court of Appeals, after a jury trial resulted in judgment for defendant, remand the cause with instructions to transfer the matter to the admiralty side of the Court for further proceedings on the unseaworthiness count?

STATUTORY PROVISIONS INVOLVED

(1) The Jones Act, the Act of June 5, 1920, c. 250 §33, 41 Stat. 1007, Title 46 U.S.C. §688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

(2) Section 6 of the Federal Employers Liability Act, the Act of April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by the Acts of Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11,

1939, c. 685, § 2, Stat. 1404 and June 25, 1948, c. 646, § 18, 62 Stat. 989, Title 45, U.S.C. §56:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

STATEMENT OF THE CASE

On January 13, 1953, respondent, a seaman in the employ of petitioner, allegedly sustained an accident in which he suffered personal injuries (R. 19b-24b). On January 26, 1953, he filed a civil action in the United States District Court for the Western District of Pennsylvania to recover for those personal injuries (1a). No diversity jurisdiction existed.

Respondent's complaint was divided into three alleged "causes of action". (1b-7b). The first sought recovery for negligence (1b-5b), the second sought recovery for maintenance and cure (5b, 6b) and the third sought recovery for unseaworthiness (6b).

Petitioner's answer asserted that the court did not have jurisdiction of the second and third "causes of action" because jurisdiction over them was exclusively in admiralty (9b).

The complaint did not allege the precise date of the accident but stated in paragraph Fifth that the date was "solely within the knowledge of the defendant" (2b). Thereafter, plaintiff filed a motion for the production of records tending to establish, *inter alia*, the date of the accident (10b), but withdrew the motion when defendant produced the requested matters (12b). Although it was or should have been, obvious from these records that more than three years elapsed between the date of accident and the date suit was instituted, the complaint was not amended, no suit in admiralty was filed and no action was taken to transfer the case to the admiralty side of the court.

In depositions taken by petitioner to ascertain, *inter alia*, the date upon which the accident occurred, respondent stated only that the accident occurred "in the early winter months" and "to my best knowledge it was in January. It may have been February of 1953." (13b). The deposition of his primary witness, Frank Sibula, produced a similar statement (13b). Respondent's narrative statement, filed as a part of pre-trial procedure of the District Court, stated that the accident occurred "on a winter morning in the early part of 1953." (14b).

At the pre-trial conference held January 5, 1959, counsel for respondent stated that he was proceeding only under the Jones Act (15b, 16b).

At the same pre-trial conference, petitioner's counsel sought a ruling that a workmen's compensation report of industrial injury (Pltfs. Exhibit 7, following 24b), fixing January 13, 1953, as the date of the accident, was admissible. (17b, 18b). A copy of that report had been given earlier to plaintiff's counsel (18b).

A jury trial of five days was held (3a), at which respondent's evidence established that the accident occurred on January 13, 1953, more than three years prior to the filing of the complaint on January 26, 1953. (19b-24b). At the conclusion of the trial, petitioner's motion for directed verdict was granted and judgment was entered for petitioner on April 23, 1959 (4a).

Respondent filed a motion to open judgment and a motion for a new trial, both of which were denied by the District Court on November 13, 1959 (Appendices A and B, 17, 18).

Respondent then appealed to the United States Court of Appeals for the Third Circuit which, on June 17, 1960, reversed the judgment of the District Court and remanded the cause for further proceedings in conformity with its opinion (Appendices C and D, 19-25). On July 20, 1960, petitioner's petition for rehearing was denied (Appendix E, 25).

By its opinion and judgment the Court of Appeals, while upholding the judgment of the District Court that any claim asserted under the Jones Act was barred by its Statute of Limitations, nevertheless remanded the cause with directions to transfer it to the admiralty side of the Court for further proceedings (Appendices C and D, 19-25).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

The judgment in Petitioner's favor on the claims asserted under the Jones Act is fully dispositive of Respondent's cause of action for his personal injuries.

A. *Election of Remedies*

The decision of the Court of Appeals in remanding the cause for further proceedings in the District Court is in conflict with the decisions of this Court in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 71 L.ed. 1069, 47 S.Ct. 600 (1927); *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221, 2 L.ed. 2d 1272, 78 S.Ct. 1201 (1958) and *United States v. Oregon Lumber Co.,* 260 U.S. 290, 67 L.ed. 261, 43 S.Ct. 100 (1922). Under those decisions the disposition in Petitioner's favor of the claims asserted in the Jones Act proceeding extinguished respondent's right to recover for his personal injuries.

Baltimore S.S. Co. v. Phillips, supra, established that there is but one cause of action for personal injuries suffered by a seaman, although he has alternative remedies at law under the Jones Act or in admiralty for unseaworthiness. This Court there further held that a judgment in an action under one of the remedies bars any proceeding under the other remedy. That decision was reiterated in *McAllister v. Magnolia Petroleum Co., supra,* where this Court again pointed out that personal injuries suffered by a seaman give rise to but one cause of action for which there are alternative "grounds" of recovery (357 U.S. at 224, 225). This is also seen in the Jones Act itself which gives the injured seaman an action for damages at law "at his election." (4).

The doctrine of election of remedies is, therefore, fully established as applicable to proceedings involving personal injuries to seamen. Under *Baltimore S.S. Co. v. Phillips, supra,* the seaman's election to pursue one remedy to judgment is final and the entry of judgment precludes resort to any other remedy.

The Court of Appeals here recognized that respondent had no right to recover under the Jones Act because his action was not timely. It further recognized the general applicability of the doctrine of election of remedies to seamen's suits arising out of personal injuries. (See also its decision in *Yates v. Dann,* 3 Cir., 1955, 223 F.2d 64). However, it refused to take the step required by the rule of the above cases—*i.e.,* affirming the judgment for petitioner. Rather, it held that the respondent's election of remedies was illusory and hence not binding. He was given a second opportunity to assert his claim for the reason that the five day jury trial established that he had no right to recover under the Jones Act because his action was filed late.

The decision, in addition to being directly in conflict with *Baltimore S.S. Co. v. Phillips, supra,* which held that entry of a final judgment in a seaman's suit barred resort to another remedy, is also directly in conflict with the decision in *United States v. Oregon Lumber Co., supra,* which held that the doctrine of election of remedies applies where the judgment in the first suit is entered because of the bar of a statute of limitations. Thus this Court has held that the very factor relied upon by the Court of Appeals in avoiding the application of the doctrine of election of remedies does not have that effect. A judgment based upon the bar of a statute of limita-

tions does bar any other proceeding, particularly where that judgment is entered after trial.

Moreover, as *Baltimore S.S. Co. v. Phillips, supra,* held, any time a claim is submitted to the Court and judgment is entered, a further proceeding is barred even though error is made in the applicable law in the first suit. The issue here as to the date of accident was apparent from the outset. Nevertheless, at pre-trial, respondent, through his counsel, unequivocally stated that he was proceeding under the Jones Act (16b).

That election was then pursued through trial and it was only after trial that the respondent's right to recover could be or was adjudicated. The fact that respondent was mistaken in his belief as to his right to recover should be of no more moment here than were the errors of law in *Baltimore S.S. Co. v. Phillips, supra.*

The Court of Appeals' decision makes the doctrine of election of remedies a nullity. Application of the doctrine has been denied because the respondent was unsuccessful in his first suit — although it is only the failure of a first remedy whichever occasions resort to a second. Under that decision a seaman would have a second chance to establish his cause of action for personal injuries any time he fails in his first attempt—because the failure of that first remedy is the heart of the Court of Appeals' decision. If a second chance is to be afforded a seaman who fails to establish during trial *one* element essential to his recovery—*i.e.,* that his suit was timely — the same second chance would apparently also be given if he fails to establish during trial any other element essential to recovery—such as

his employer's negligence. The doctrine of election of remedies is designed however to prevent just that—to prevent multiple suits based on the same cause of action. Thus the very circumstance relied upon by the Court of Appeals here to avoid the effect of the election of a remedy is, in fact, the one which calls the doctrine into play. Compare: *United States v. Oregon Lumber Co., supra,* at 300, 301 of 260 U. S.

Here the issue of the date of accident was fully presented throughout the case, just as the question of negligence or fault is presented in most other cases brought under the Jones Act. That issue was only resolved upon completion of the jury trial. The decisions of this Court, we submit, clearly require that that trial be the last one involving the single cause of action arising out of the respondent's personal injury. Hence judgment should be entered for the petitioner.

B. *Statute of Limitations*

The holding of the Court of Appeals that all relief sought is not barred by the passage of time is also contrary to the rules of law enunciated by this Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 3 L.ed 2d 368, 79 S.Ct. 468 and in *McAllister v. Magnolia Petroleum Co., supra.*

This action was filed as a civil action and was instituted, handled and finally tried by a jury as a civil action, even though it contained a count for unseaworthiness. As pointed out in *McAllister v. Magnolia Petroleum Co., supra,* recovery for unseaworthiness may be sought in a civil action instituted by a seaman so that he is not deprived of any of his rights under the Jones Act. Nevertheless, as *Romero v. International Terminal*

Operating Co., supra, establishes, where, as here, there is no diversity jurisdiction, civil jurisdiction is present only because the action is instituted under the Jones Act.

The right to proceed at law under the Jones Act is expressly qualified by the three year statute of limitations of the Federal Employers Liability Act (3, 4). Thus, the Jones Act, which is essential to jurisdiction here, necessarily requires the entry of judgment for petitioner. So long as civil jurisdiction exists only because of the Jones Act, its statute of limitations must be fully applied. Respondent, who relied on the Jones Act to establish civil jurisdiction, must take the burdens as well as the benefits of its use. This is the obvious corollary to the rule enuniciated by the majority in *McAllister v. Magnolia Petroleum Co., supra — i.e.,* that a seaman's rights under the Jones Act cannot be diminished by applying a shorter statute of limitations to an unseaworthiness claim asserted under the Jones Act. Similarly, a seaman's Jones Act rights cannot be *expanded* by applying a longer statute of limitations to an unseaworthiness claim asserted in the Jones Act proceeding. Otherwise, any seaman could secure a jury trial of his cause of action by the simple expedient of joining a claim of unseaworthiness with a stale negligence claim asserted under the Jones Act.

Romero v. International Terminal Operating Co., supra, also gives special significance to the concurring opinion of Mr. Justice Brennan in *McAllister v. Magnolia Petroleum Co., supra.* There Mr. Justice Brennan stated that a claim based on unseaworthiness, when asserted in a Jones Act proceeding, should be measured by the Jones Act statute of limitations (357 U.S. at 229,

230), even though in the *McAllister* case the Jones Act was not essential to the lower state court's jurisdiction. Here, however, the Jones Act, and every part of it, is essential to the courts' jurisdiction because no diversity exists. Thus, the *Romero* decision makes it clear that the rule enunciated by Mr. Justice Brennan governs all civil actions for personal injuries brought by seamen in the federal courts where no diversity jurisdiction exists. The District Court in this case therefore properly relied upon that rule in dismissing the entire suit (17, 18). The Court of Appeals erred in applying the doctrine of laches to the unseaworthiness count.

Because this is a civil action in which the Jones Act alone confers jurisdiction, the unseaworthiness count, as well as the negligence count, are governed by the Jones Act statute of limitations. Hence recovery under either is barred by the late filing of suit.

If the decisions in *Romero v. International Terminal Operating Co.*, supra and *McAllister v. Magnolia Petroleum Co.*, supra, do not dispose of this issue, we submit that the important federal question of when an unseaworthiness claim, asserted on the civil side, is barred by the passage of time has not been decided by this Court. See footnote 5, *McAllister v. Magnolia Petroleum Co.*, supra, (357 U S. at 224). It is an issue directly presented by this case. It is clearly one of substantial interest. As Judge Moore of the Second Circuit pointed out in his concurring opinion in *Oroz v. American President Lines*, 2 Cir., 1958, 259 F.2d 636 (cert. denied 359 U.S. 907, 3 L.ed 2d 572, 79 S.Ct. 584), the submission of the question of laches to a jury will necessarily produce non-uniform and, quite probably, unjust results.

It might well make ineffectual the policy of the law which recognizes that there must be a termination of liability through the passage of time. The question would, therefore, be an appropriate one for decision by this Court.

II.

Remanding a civil action, after trial and final judgment to a District Court for transfer to the admiralty side of the Court for further proceedings is improper.

The Court of Appeals properly recognized that the petitioner was entitled to judgment under the Jones Act. On the other hand it substantially reduced the effect of that judgment by obliterating the distinction between proceedings in admiralty and those at law. Although the proceeding was initiated and prosecuted through the District Court as a civil action, the Court of Appeals has concluded that it was, or should have been, at least in part, a proceeding in admiralty. Its decision is based not on what was done, but rather on what hindsight indicates should have been done.

Though respondent might have been wiser to proceed in admiralty, he elected to, and insisted, that he proceed at law with a jury trial. As pointed out in Part I of this Argument, the judgment entered, after trial, in the civil action he brought terminates any right to bring a claim in admiralty. That election, that judgment and their effect cannot be avoided by simply regarding the suit, though properly decided, as a nullity and starting all over in admiralty. The prohibition against a second suit established by *Baltimore S.S. Co. v. Phillips, supra,* should not be avoided by merely splitting

the first suit after trial and entry of judgment as the Court of Appeals did, for then in reality, there are two suits, not one. If the unseaworthiness count is to be considered as a separate suit now, it is subject to all the same defenses to which any other second suit on the same cause of action would be.

However, wholly aside from the fact that the doctrine of election of remedies and the final judgment in petitioner's favor prevents further proceedings, the Court of Appeals' decision is erroneous because it also ignores the long standing distinction between proceedings at law and those in admiralty. As recently as June 21, 1960, this Court in *Miner v. Atlass*, 363 U.S. 691, 4 L. Ed. 2d 1462, 80 S. Ct., recognized one of these many distinctions. The admiralty rules promulgated by this Court illustrate, quite clearly, the continuing separation of the admiralty side of the Courts from the civil side.

Romero v. International Terminal Operating Co., supra, clearly delineated the jurisdictional differences between proceedings at law and those in admiralty and demonstrated that the two practices are not such that cases can be shunted from one side to the other merely because a party might be able to recover in one but not in the other. *McAllister v. Magnolia Petroleum Co., Baltimore S. S. Co. v. Phillips,* and other similar cases are meaningful only if the distinction between suits in admiralty and civil actions is fully recognized. Those cases make it clear that a case is to be decided upon the principles of law applicable to the side of the Court in which it was brought.

The impropriety of obliterating the distinctions between law and admiralty is singularly apparent when it

occurs, not in preliminary stages of the case but rather, after a full trial before a jury resulted in the entry of a final judgment. Then it can only have the effect of subjecting parties to a multiplicity of suits and the courts to increased case burdens. The policy of the law, as seen in the doctrines of res judicata and of election of remedies, is to prevent just such multiplicity of suits. This is a salutary policy which should be strengthened, not destroyed.

We respectfully submit that there is no authority for the procedure followed by the Court of Appeals in the Rules of Civil Procedure, in the Admiralty Rules, or in the decisions of this Court. The establishment of such a procedure necessarily involves such important questions of federal law and practice that this Court should consider the matter fully.

CONCLUSION

The decision of the Court of Appeals is erroneous and conflicts with the decision of this Court in that it fails to apply the doctrine of election of remedies which precludes any further proceedings on the single cause of action which respondent had for his personal injuries. That decision also fails to give the required effect to the statute of limitations of the Jones Act which bars any recovery sought by this respondent in the civil action which he filed. Finally, in remanding the cause with directions to transfer it to the admiralty side of the District Court, the Court of Appeals not only failed to apply the foregoing principles, but also embarked upon a procedure for which there is no authority. For each of these reasons we respectfully submit that this Court should grant a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court for the Western District of Pennsylvania

The evidence at the trial of this action established that the accident resulting in plaintiff's injuries took place more than three years prior to the filing of plaintiff's complaint. Plaintiff's complaint was filed under the provisions of the Jones Act, 46 U.S.C.A., Sec. 688, alleging injury due to the negligence of the defendant, its agents, servants and employees, and also alleging injury due to the unseaworthiness of the vessel on which plaintiff was employed. The Court directed the entry of judgment in favor of defendant, in accordance with its motion for directed verdict, in view of the provisions of the Jones Act which incorporate the three year statute of limitations under the Federal Employers Liability Act, 45 U.S.C.A., Sec. 56.

Plaintiff has moved to open judgment and for a new trial, contending that the statute of limitations under the Jones Act is not applicable to his action for unseaworthiness.

The following statement of Mr. Justice Brennan in his concurring opinion in the case of McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 229 (1958) is appropriate:

> "Just as equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, see *Russell v. Todd*, 309 U.S. 280, 287, I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence

under the Jones Act, 46 U.S.C. §688. This reference seems especially appropriate since the seaman's remedy for unseaworthiness under the general maritime law and his remedy for negligence under the Jones Act are but two aspects of a single cause of action. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316.

It thus seems to me that the three-year limitation on the Jones Act remedy, 45 U.S.C. §56, is the ready and logical source to draw upon for determining the period within which this federal right may be enforced. . . ."

In accordance with this principle, plaintiff's motion to open judgment and for a new trial will be denied.

/s/ HERBERT P. SORG, D. J.

Dated: November 13, 1959.

APPENDIX B

Order

AND NOW, this 13th day of November, 1959, plaintiff's motion to open judgment and for a new trial, is denied.

/s/ HERBERT P. SORG, D. J.

APPENDIX C

Opinion of the Court
Filed June 17, 1960

Argued April 7, 1960
Before
McLAUGHLIN, STALEY and FORMAN, *Circuit Judges.*

By STALEY, *Circuit Judge.*

Did the district court err in granting defendant's motion for a directed verdict upon the ground that the statute of limitations under the Jones Act, 46 U.S.C.A. § 688, had run where the seaman's complaint contained a negligence count and an unseaworthiness count?

A complaint was filed by John A. Wounick on January 26, 1956. It contained three counts, one under the Jones Act for negligence, another for unseaworthiness, and the last for maintenance and cure.[1] The second defense set forth in the answer thereto alleged that the court did not have jurisdiction over the second and third "causes of action, the same being exclusively cognizable in an action instituted under the admiralty and maritime laws." No defense of the statute of limitations or laches was raised in the answer, however.

There apparently was some question as to the exact date of the accident, and the plaintiff, in his complaint, merely alleged that the date of the accident was "solely within the knowledge of the defendant which date defendant refuses to divulge, during the early months of

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1. The record fails to disclose any disposition of the count for maintenance and cure, and thus that issue is not before us.

the winter of 1953." Although a motion to produce and inspect numerous documents was filed on May 21, 1956, and later withdrawn pursuant to stipulation of the parties, plaintiff states in his appellate brief that the exact date of the accident, i.e., January 13, 1953, was unknown to him prior to trial.[2] At the conclusion of its case, the defendant moved for a directed verdict on the grounds, inter alia, that the complaint was filed too late. The motion was granted and judgment entered on April 23, 1959.[3] Subsequently, plaintiff filed a motion to open judgment and for a new trial, which was denied by the court.

Plaintiff contends that the district court was in error in applying the Jones Act period of limitations to the unseaworthiness count and that the court improperly applied the doctrine of laches, which is applicable thereto.

Defendant maintains that the instant appeal is governed by principles laid down in Yates v. Dann, 223 F.2d 64 (C.A.3, 1955), and that plaintiff, having made an election to proceed under the Jones Act on the civil side of the court and having failed, is barred from now proceeding with his cause of action *in admiralty*. In Yates v. Dann, supra at page 67, we stated:

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2. Plaintiff's Exhibit No. 7, "Employer's Report of Industrial Injury," which plaintiff undoubtedly obtained from the defendant sometime prior to trial, indicates that the accident occurred on January 13, 1953.

3. Although the court in granting the motion did not indicate specifically the grounds for so doing, it is apparent to us that it was granted upon the ground of the statute of limitations under the Jones Act since the court based its refusal to grant a new trial on that ground. Further, the parties in their briefs in this case neither raise nor discuss any other grounds.

"* * * It may also be true that the 'spirit of modern pleading' will allow a claimant to transfer his whole case from the law side to admiralty at any time before trial. [Citing cases.] But if the election required by the Jones Act means anything at all, it must mean that a plaintiff suing under its provisions cannot in the same action have the issue of defendant's liability tried at law with a jury and the issue of damages resulting from the identical liability tried by the court in admiralty without a jury."

Without retreating from the principle set forth in the Yates case, we are convinced that it is inapplicable to the case at bar. The Jones Act provides that

"* * * Any seaman who shall suffer personal injury in the course of his employment may, *at his election*, maintain an action for damages at law, with the right of trial by jury * * *." (Emphasis supplied.)

The election granted by the Jones Act confers a valuable right upon a seaman and not a mere formal one. Analysis of the facts of this litigation indicates that, in fact, plaintiff, when he filed his claim, never had any subsisting rights under the Jones Act. As we recently had occasion to state in Claussen v. Mene Grande Oil Company, 275 F.2d 108, 110 (C.A.3, 1960), " 'The three year statute of limitations, 45 U.S.C.A. § 56, under the Jones Act is implacable in its terms * * *. The lapse of three years between the date of injury and the date of suit extinguishes the right of action.' [163 F. Supp. 781.] Accord Engel v. Davenport, 1926, 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813; Damiano v. Pennsylvania R. Co., 3 Cir. 1947,

161 F.2d 534; Bell v. Wabash R. Co., 8 Cir., 1932, 58 F.2d 569." At the time the claim was filed by plantiff here, the three-year statute of limitations having run, all rights under the Jones Act had been extinguished. Plaintiff's only available remedy for his cause of action, which was in part grounded on a right based on the ancient maritime law, was in admiralty. It can thus hardly be said that plaintiff exercised an election, or made a choice between remedies when actually there was only one remedy available. The principle set forth in Yates v. Dann is therefore inapposite for there an election was made between two equally available remedies.[4] We think that, in these circumstances, the cause should have been transferred to the admiralty side of the court, and the doctrine of laches applied. See Jordine v. Walling, 185 F.2d 662 (C.A.3, 1950).[5]

The district court, in an unreported opinion on the motion to open judgment and for a new trial, recognized

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4. Similarly, the doctrine of pendent jurisdiction is not applicable for the running of the statute of limitations extinguished the Jones Act right, not merely the remedy, and therefore there was nothing to which the maritime action could attach. Thus, since there was no diversity of citizenship between the parties, there was no jurisdiction on the civil side of the court. See Jordine v. Walling, 185 F.2d (C.A.3, 1950).

5. See Mahnich v. Southern S.S. Co., 45 F. Supp. 839 (E.D.Pa., 1941), affirmed per curiam, 129 F.2d 857 (C.A.3, 1942), reargued and affirmed 135 F.2d 602 (C.A. 3, 1943), reversed 321 U.S. 96 (1944). In that case the Supreme Court recognized that although the statute of limitations had run on a possible Jones Act claim, the seaman could pursue his cause of action in admiralty grounded on a right based upon the maritime law. See also dissenting opinion of Justice Frankfurter, Mitchell v. Trawler Racer, Inc., — U.S. — (decided May 16, 1960).

that the Joes Act statute of limitations does not apply directly to the unseaworthiness count but applied it by analogy as a basis for holding that laches barred that maritime cause of action. Thus there is a recognition by the district court, albeit sub silentio, with which we agree, that the complaint adequately spells out a cause of action in admiralty. Further, the district court, recognizing that the Jones Act statute of limitations was not strictly applicable, relied on a portion of the concurring opinion of Justice Brennan in McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958). It was there stated, at page 229, that "Just as equity follows the law in applying, *as a rough measure of limitations*, the period which would bar a similar action at law, see Russell v. Todd, 309 U.S. 280, 287, I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 U.S.C. §688." (Emphasis supplied.) Rather than being a new departure in the maritime law, this opinion appears to be in accord with the well-established equity principles long applied by our admiralty courts. Kane v. Union of Soviet Socialist Republics, 189 F. 2d 303 (C. A. 3, 1951), cert. denied, 342 U.S. 903 (1952); Loverich v. Warner Co., 118 F. 2d 690 (C. A. 3), cert. denied, 313 U.S. 577 (1941). As was stated in the latter case, at page 693, "The analogy to the statute of limitations, however, is only an analogy and not a rule. [Citing case.] 'Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time.'" The record in this appeal, however, fails to disclose that the district judge exercised his discretion in dismissing the

unseaworthiness count on the basis of laches. Rather it appears that he felt bound to dismiss it inasmuch as the analogous Jones Act statute of limitations had run. The case must, therefore, be returned to the district court for a full consideration of all the relevant facts pertaining to laches, e.g., that the defendant had knowledge of the accident from the day of its occurrence; that it had a list of possible witnesses from the same date; and that the complaint (libel) was filed only thirteen days following the running of the analogous three-year statute of limitations. On remand the plaintiff should also be granted an opportunity to amend his libel and plead any additional facts negativing prejudice and excusing his delay. See Kane v. Union of Soviet Socialist Republics, supra, and Loverich v. Warner Co., supra.

The judgment will be reversed and the cause remanded for further disposition not inconsistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX D

Judgment

Present:

McLAUGHLIN, STALEY and FORMAN, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded for further disposition not inconsistent with the opinion of this Court.

ATTEST:
IDA O. CRESKOFF
Clerk

June 17, 1960

APPENDIX E

Sur Petition for Rehearing

Present:

McLAUGHLIN, STALEY and FORMAN, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT
STALEY, Circuit Judge

Dated: July 20, 1960

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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1960

NO. 428

PITTSBURGH CONSOLIDATION COAL COMPANY, Petitioner,

v.

JOHN A. WOUNICK, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The judgment and decree sought to be reviewed are interlocutory and

(a) do not involve any novel or important question of law basic to the petitioner's position;

Mere reference to the judgment of the Third Circuit Court in Appendix C of the Petition for Writ of Certiorari, pages 23 and 24, demonstrates that the cause of action predicated upon the doctrine of unseaworthiness was not even ready for trial let alone tried and disposed of substantively by the District Court; and remand by the judgment of the Circuit Court is clearly in the nature

of a procedendo, and is, therefore, interlocutory. As this Court has repeatedly held, a non-final judgment is not subject to review by certiorari herein except in special instances; *American Construction Company v. Jacksonville T. & K. R. Co.*, 148 U. S. 372, 384, 13 S.Ct. 758, 37 L.ed. 486, wherein it was clearly asserted that "this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; *Youngstown Sheet & Tube Company v. Sawyer*, 343 U. S. 579, 584-5, 72 S.Ct. 863, 96 L.ed. 1153.

The pronouncement of policy in regard to interlocutory appeals is in accord with the ruling law as set out in *4 Corpus Juris Secundum, Par. 92, page 238* as follows:

> "It is the general rule, therefore, that an appeal, writ of error, exceptions, or other proceeding for review will not lie from or to an interlocutory or intermediate decision unless it is expressly permitted by statute, rule or constitutional provision,—"

The rule particularly applies where the judgment of the Circuit Court is one remanding the case to the District Court for a new trial; *American Construction Company v. Jacksonville, etc., supra.* Most recently this Honorable Court has reaffirmed its policy of avoiding piecemeal appeals in its decision in *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U. S. 77, 81, 78 S. Ct. 1063, 1066, 2 L.ed. 2d 1174, wherein it reaffirmed *Slaker v. O'Connor*, 278 U. S. 188, 189, 49 S. Ct. 158, 73 L.ed, 258, subject to the modification of *South Carolina Electric and Gas Company v. Flemming*, 351

U.S. 901, 76 S. Ct. 692, 100 L.ed 1439, requiring finality of judgment as a basis for appeal except where, in effect, "the Court of Appeals resolved all disputed questions between the parties." Certainly the judgment of the Third Circuit does not resolve any of the factual disputes involved between the parties; and, in the words of the Circuit Court, referring to the record below, "no defense of the statute of limitations or laches was raised in the answer,—" (Appendix C, Petition for Writ, page 9); and "The case must, therefore, be returned to the district court for a full consideration of all the relevant facts pertaining to laches, e.g., that the defendant had knowledge of the accident from the day of the occurrence; that it had a list of possible witnesses from the same date; and that the complaint (libel) was filed only thirteen days following the running of the analogous three-year statute of limitations. On remand, the plaintiff should also be granted an opportuntity to amend his libel and plead any additional facts negativing prejudice and excusing his delay."

(b) there is no conflict on a question of law with another Court of Appeals or a highest State Court justifying review at this stage;

In view of the lack of pleadings, proof or trial disposition of the issues yet to be placed before the District Court, it is inconceivable how petitioner hopes to impose the controversy upon this Honorable Court at this stage. The petition certainly does not bring before this Honorable Court any substantive conflict in law, or anomalous or other pressing and undefined area of law requiring extraordinary review such as would affect the course of the trial below. There is no state statute or

right to be molded by decisional law of this high tribunal with the maritime law as justified an appeal in *The Vessel M/V Tungus, etc. v. Olga Skovgaard etc.*, 358 U. S. 588, 79 S. Ct. 503, 3 L.ed 2d 524, or in the cases above cited and in *United States v. General Motors Corp.*, 323 U. S. 373, 65 S. Ct. 357, 89 L.ed. 311.

The simple and obvious fact is that the Third Circuit recognized that the learned District Judge, being under the impression that the three-year statute of limitations of the Jones Act barred also the cause of action based upon unseaworthiness, dismissed the latter action without trial thereof.

(c) there is no jurisdictional question barring trial in the District Court;

Certainly, it is not disputed that when the case is returned to the District Court, it must assume an admiralty status by reason of the lack of diversity, amendments to the pleadings on the part of both parties will be required and, thereafter, for the first time, the cause will be put to trial. At no time in the pleadings or in the petition for writ of certiorari does the petitioner deny that the District Court has jurisdiction to carry out the mandate of the Third Circuit or to apply, upon the trial, the rules and law of admiralty appertaining.

(d) the cause remanded for trial has not yet been tried by the District Court;

The frank and clear statement of the learned Trial Judge as appears in Appendix B of the Petition for Writ at pages 17 and 18 indicates that dismissal of the unseaworthiness count and cause was predicated upon a mere mistake of law as well as a belief that it was not

necessary for the Trial Court to enter into the elements of proof required by the defense of laches, but that the three-year statute of the Jones Act was an absolute bar to any cause of action based upon unseaworthiness.

As the Third Circuit clearly points out, the Jones Act cause did not exist at the time of the filing of the combined action inasmuch as the three-year statute of limitation, being substantive, had already run; the only right of action remaining in the plaintiff seaman at that time, therefore, was obviously the one that remains untried. Under these circumstances, the Third Circuit points out that the doctrine of elections is not applicable since there was no election posed for the seaman plaintiff, his sole and only remedy lying in admiralty and the general maritime law.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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